

8 Oral Argument

8.1 Oral Argument Coordinator

All inquiries and requests (not coming from the news media) regarding the scheduling, attendance, seating, and administration of oral argument should be directed to the Oral Argument Coordinator. News media should contact the Public Affairs Office. See Chapter 8.5(c) (News media).

Correspondence sent by first-class mail should be addressed as follows:

Oral Argument Coordinator
Clerk's Office
Board of Immigration Appeals
P.O. Box 8530
Falls Church, Virginia 22041

Correspondence sent by overnight delivery, courier service, or personal delivery should be addressed as follows:

Oral Argument Coordinator
Clerk's Office
Board of Immigration Appeals
5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

The Oral Argument Coordinator may also be reached at (703) 605-1007.

8.2 Selection of Cases

(a) Appeals. — Oral argument is held at the discretion of the Board and is rarely granted. When an appeal has been taken, oral argument, if desired, must be requested on the Notice of Appeal. 8 C.F.R. § 1003.1(e)(7). Oral argument must be requested at the outset of the appeal, or oral argument may be deemed waived. In either the Notice of Appeal or a brief, the appealing party should explain the reason for requesting oral argument and articulate how oral argument would supplement any written submissions. While the Board reserves the authority to solicit oral argument, the Board generally does not solicit oral argument from parties who did not initially request it.

(b) Motions. — Oral argument is available, though infrequently granted, to parties moving to have the Board reopen or reconsider their case. 8 C.F.R. § 1003.2(h). The moving party should request oral argument in a separate but accompanying document with a cover page labeled “REQUEST FOR ORAL ARGUMENT.” See Appendix F (Sample Cover Page). The request must explain the reason for requesting oral argument and articulate how oral argument would supplement any written submissions. While the Board reserves the authority to solicit oral argument, the Board generally does not solicit oral argument from parties who did not initially request it.

(c) Requests by responding parties. — Either party to an appeal or motion may request oral argument.

(i) Appeals. — In the event the party opposing the appeal wishes to request oral argument, the request must be made prior to the expiration of the briefing schedule. That party should request oral argument in a separate but accompanying document with a cover page labeled “REQUEST FOR ORAL ARGUMENT.” See Appendix F (Sample Cover Page). The request must explain the reason for requesting oral argument and articulate how oral argument would supplement any written submissions.

(ii) Motions. — In the event that a party responding to a motion wishes to request oral argument, the request should accompany the reply to the motion, which itself must be filed in accordance with the deadline set in the regulations. See 8 C.F.R. § 1003.2(g)(3). That party should request oral argument in a separate, but accompanying document with a cover page labeled “REQUEST FOR ORAL ARGUMENT.” See Appendix F (Sample Cover Page). The request must explain the reason for requesting oral argument and articulate how oral argument would supplement any written submissions.

(d) Criteria. — Cases are selected for oral argument because they meet one or more of a number of criteria, including but not limited to: (i) the resolution of an issue of first impression; (ii) alteration, modification, or clarification of an existing rule of law; (iii) reaffirmation of an existing rule of law; (iv) the resolution of a conflict of authority; and (v) discussion of an issue of significant public interest.

8.3 Notification

(a) Request granted. — If a request for oral argument is granted, the Board notifies the parties through a notice of selection sent after the briefing schedule has concluded. The notice will specify the time and place scheduled for oral argument. Parties are generally provided at least 30 days’ advance notice of the date scheduled for oral argument. The parties are also provided with

a copy of this chapter, a copy of the document “Questions and Answers Regarding Oral Argument Before the Board,” and any other materials the Board deems appropriate.

The selection notice directs the requesting party to confirm that oral argument is still desired. In most cases, the requesting party is provided at least 15 days in which to respond to the selection notice. In cases involving detained aliens, however, the requesting party is expected to respond to the selection notice immediately, in light of the exigencies of such cases.

(i) Confirmation received. — Once a party confirms interest in oral argument, the oral argument calendar is fixed, and the parties are subject to the rules and obligations that attach to oral argument. Supplemental briefs may be filed, but the parties are not sent a supplemental briefing schedule. See Chapter 8.7(c)(vi) (Additional authorities).

(ii) Confirmation not received. — If a party does not confirm an interest in oral argument, the Board deems the party’s request waived and adjudicates the case on the existing record.

(iii) Continuance or postponement. — Parties are expected to make all reasonable efforts to resolve conflicts in their schedules to permit them to attend oral argument as scheduled. In view of the difficulty in meeting the scheduling needs of the Board and the parties, the Board disfavors motions for continuance or postponement.

(b) Request denied. — If a request for oral argument is denied, the Board does not specifically notify the parties but simply adjudicates the merits of the appeal or motion. Thus, parties should never assume that oral argument will be granted. The Board will notify the parties when a request for oral argument has been granted.

8.4 Location

Oral argument is conducted on site at the Board in Falls Church, Virginia. In rare instances, the Board may conduct oral argument in a location other than Falls Church. 8 C.F.R. § 1003.1(e)(7).

8.5 Public Access

(a) General public. —

(i) Open argument. — With the exceptions noted below, oral argument is generally open to the public and employees of the Department of Justice, subject to space limitations and priorities given to the parties and the news media. See generally 8 C.F.R. § 1003.27(a).

(ii) Closed argument. — Absent the express consent of the alien (or the alien's representative, if represented) and the agreement of the Board, oral argument is not open to the general public or the news media in cases involving the following:

- exclusion proceedings
- applications for asylum
- applications for withholding of deportation / removal
- an abused spouse or child
- claims brought under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

See generally 8 C.F.R. §§ 1003.27, 1208.6, 1240.10(b), 1240.11(c)(3)(i), 1240.32, 1240.33(c)(1). Only parties, their representatives, and persons authorized by the Board in advance, including employees of the Department of Justice, may attend a closed argument.

The Board may limit attendance or hold a closed hearing if appropriate to protect parties or witnesses, or when a closed hearing is otherwise in the public interest. See generally 8 C.F.R. § 1003.27(b).

(iii) Requests to open oral argument. — In appropriate cases, parties may waive their right to a closed hearing and permit oral argument to be open to the public. The request must be made in writing at least 15 days prior to the scheduled date of oral argument and must be served upon the other party. See Chapter 3.2 (Service). The request should be phrased as follows:

"I hereby request and consent that oral argument in the matter of [name of party] be open to the public and, further, I hereby consent that information contained within the record of proceedings may be released to the public. I acknowledge that this waiver of confidentiality may not be withdrawn after oral argument has begun."

Parties may not retract their request within 24 hours of the scheduled time for oral argument. Also, parties may not request that specific persons be excluded from an open oral argument.

(iv) Requests to close oral argument. — Certain types of oral argument cases are automatically closed to the public. See Chapter 8.5(a)(ii) (Closed argument). The Board may, at its discretion, close oral argument. See generally 8 C.F.R. § 1003.27(b). A party may request that oral argument be closed, but must do so in writing at least 15 days prior to the time of oral argument and serve the request on the other party. See Chapter 3.2 (Service). The request must set forth in detail the rationale for closing the hearing.

(v) Reserved seating. — A party may request that the Board reserve up to 5 gallery seats for the party's invitees. A reserved seating request must be made to the Oral Argument Coordinator at least 15 days prior to the scheduled date of oral argument. The Board tries to accommodate all reasonable requests for additional seating, subject to space limitations and any special considerations that may arise.

(b) Recording and broadcasting. — The public, including the parties and the news media, may not bring any recording or broadcasting devices into oral argument, whether photographic, audio, video, or electronic in nature. See generally 8 C.F.R. § 1003.28.

(c) News media. — Representatives of the news media may attend oral argument that is open to the public. The Board reserves 10 gallery seats for members of the media. The news media are subject to the general prohibition on recording and broadcasting. See subsection (b), above. The news media are welcome to contact the Public Affairs Office for information about cases selected for oral argument and to request reserved seating. Seating reservations should be made at least 24 hours in advance of the scheduled time for oral argument. See Appendix B (Directory).

8.6 Appearances

(a) Notices of Appearance. — Only parties, their representatives, and amicus curiae invited by the Board may participate in oral argument. See generally Chapter 2 (Appearances before the Board). Every representative who wishes to argue before the Board must file a Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals (Form EOIR-27). See Chapter 2.1(b) (Entering an appearance). If, at any time after the filing of the appeal, there is a change in representation, the new representative must immediately file a Notice of Appearance. See Chapters 2.1(b) (Entering an appearance), 2.3(c) (Appearances), 2.3(i) (Change in representation).

(b) Multiple representation. — Parties are limited to one representative of record. See Chapter 2.3(e) (Single representative). If a representative of record wishes to share oral argument with another person, or wishes another person to argue in his or her place, he or she must make

arrangements with the Oral Argument Coordinator in advance. That person must both satisfy the appearance requirements and file a separate Notice of Appearance (Form EOIR-27). See Chapter 2.1 (Representation Generally). The Notice of Appearance should reflect that his or her appearance is solely for the purpose of participating in oral argument, which is done by writing in large letters next to the name block the words: "ORAL ARGUMENT ONLY." The Notice of Appearance must be sent directly to the Oral Argument Coordinator.

Representatives who appear solely for the purpose of oral argument are advised that, once oral argument is concluded, all notices and Board correspondence will be sent only to the representative of record. The representative of record is responsible for providing copies of notices or correspondence to the representative who entered an appearance strictly for oral argument purposes.

(c) Motions to withdraw. — Once oral argument is scheduled, motions to withdraw as counsel are entertained only where good cause is shown. See Chapter 2.3(i)(iii) (Withdrawal of counsel). Substitution of counsel is permitted. See Chapter 2.3(i)(i) (Substitution of counsel).

8.7 Rules of Oral Argument

(a) Attire. — The Board expects all persons to respect the decorum of the court. Representatives are expected to appear in business attire. All others in attendance are expected to dress in proper attire.

(b) Conduct. — All persons attending oral argument must respect the dignity of the proceedings. Talking is not permitted in the gallery during oral argument, nor may attendees depart or enter the room once oral argument has begun. Disruptive behavior is not tolerated.

(i) Representatives. — Attorneys and other representatives are expected to observe the professional conduct rules and regulations of their licensing authorities and to present, at all times, a professional demeanor becoming an officer of the court.

(ii) Represented parties. — Parties who are represented are welcome, but not required, to attend oral argument. Represented parties are permitted to observe but may not speak during oral argument.

(iii) Detained aliens. — Detained aliens are not permitted to attend oral argument.

(iv) Amici curiae. — Amici curiae are subject to the same rules of conduct as representatives. See Chapter 8.7(d)(xiii) (Amicus curiae).

(c) Prior to oral argument. —

(i) Check in. — On the day of oral argument, parties are required to check in at least 30 minutes prior to the scheduled time for oral argument. The Oral Argument Coordinator will advise the parties regarding the procedures for check in.

(ii) Adverse weather conditions. — In the event of adverse weather conditions, parties should contact the Oral Argument Coordinator for guidance or otherwise comply with the instructions provided in the selection notice.

(iii) Failure to appear for oral argument. — In the event that either party fails to appear for oral argument, the Board may hear the argument of the side that does appear, in which case the argument is entered into the record and considered by the Board in rendering its decision. Given the administrative burden of scheduling oral argument, the Board considers an unexplained failure to appear to be a serious discourtesy to both the Board and the other party and will sanction representatives accordingly. The party whose representative fails to appear will not be penalized for that failure, except insofar as that party will be deprived of the benefit of his or her case being argued.

(iv) Late arrival for oral argument. — If a party is unable to arrive for oral argument at the appointed time due to extenuating circumstances, such as travel delays, the party should immediately contact the Oral Argument Coordinator or, if the Oral Argument Coordinator is not available, the Board's main telephone number. See Appendix B (Directory).

(v) Supplemental briefs. — While the Board generally does not accept supplemental briefs, an exception is made for cases that have been granted oral argument. Parties may submit supplemental briefs in anticipation of oral argument, but parties are not sent a supplementary briefing schedule. Parties may submit supplemental briefs until 15 days prior to the date of oral argument. Parties may reply to supplemental briefs up until 7 days prior to the date of oral argument. Supplemental briefs should be directed to the Oral Argument Coordinator. Supplemental briefs are subject to the same requirements as other briefs. See generally Chapters 3 (Filing with the Board), 3.2 (Service), 4.6 (Appeal Briefs), 5.4 (Motion Briefs). Supplemental briefs must be served on the opposing party as expeditiously as they are served on the Board.

(vi) Additional authorities. — Both oral argument and any supplemental briefs should be based on a thorough research of legal authorities and should include all legal authority that a party might wish to rely upon in oral argument. In the event that a party

locates additional legal authority subsequent to the filing of a supplemental brief, parties should observe the following:

(A) Supplemental authorities. — If a party inadvertently omits a legal authority and wishes to refer to it at oral argument, that party must so notify the Board (and provide a copy, where appropriate) in advance of oral argument. See Chapter 3.2 (Service). Opposing parties must be informed (and provided a copy, where appropriate) as expeditiously as the Board. Parties may not use supplemental authority, however, as an excuse to file a supplemental brief after the time for briefing has expired. Once the supplemental briefing deadline has passed, see subsection (v), above, the Board will not consider any filing that appears in form or substance to be a brief.

(B) New authorities. — If a party discovers a newly available authority, that party should inform the Oral Argument Coordinator and the opposing party immediately. Parties should promptly submit a statement regarding the significance, or lack thereof, of the new authority to the matter being argued. The Board will thereafter determine what action, if any, will be taken in light of the new authority.

(vii) Exhibits. — The Board accepts no new evidence on appeal. If a party wishes to display exhibits used in the proceeding below, or wishes to use presentation aids that do not constitute evidence, the party must make prior arrangements with the Oral Argument Coordinator for delivery and display. The party is also responsible for removing any exhibits or presentation aids at the conclusion of the proceeding.

(viii) Reviewing the record of proceedings. — Parties wishing to review the record of proceedings should make arrangements with the Oral Argument Coordinator prior to oral argument. Absent special arrangements, the record is not available for review in the 2 hours prior to the scheduled time for oral argument.

(d) Oral argument. — Oral argument should be approached as an opportunity to expand upon, and not merely repeat, a party's written arguments. Parties arguing before the Board should follow the rules and guidelines below.

(i) Oral argument tables. — Parties are generally limited to two legal staff each at the oral argument tables. This limit includes representatives, paralegals, and all other personnel. Represented parties who attend oral argument may not sit at the oral argument tables but are provided priority seating in the gallery.

(ii) Addressing the Board. — Individual Board Members are to be referred to as either “Board Member _____” or “Your Honor.” Titles, such as “Chairman _____” and “Vice Chairman _____,” may also be used. The Board Members as a group may be referred to either as “the Board” or “Your Honors.”

(iii) Standing and sitting. — Parties must stand when addressing the Board. Where a podium is provided, parties must speak from that podium during opening and closing statements. At other times, parties may respond to the Board’s questions from the oral argument table, provided that they stand when doing so. The only exception to this protocol is when a Board Member’s question elicits a brief response, such as a “yes-or-no” answer. At all other times, parties may remain seated.

(iv) Familiarity with the record. — Parties are expected to be thoroughly familiar with the record. Parties should prepare oral argument with the understanding that the Board Members have studied the briefs and are also thoroughly familiar with the record.

(v) Opening statements. — At the commencement of oral argument, persons to argue before the Board should rise and introduce themselves. Opening statements are encouraged. An opening statement should include a brief introduction to the case and the core issue or issues being argued. Parties should not read at length from briefs, authorities, or the record.

(vi) Recitation of facts. — A brief chronological statement of the pertinent facts, where warranted, is welcome at the outset of oral argument. Extensive recitation of facts, however, is discouraged.

(vii) Recitation of law. — Oral argument should focus upon the critical points of law that can be properly addressed during the time for oral argument. In their oral presentation, parties may not cite to any case, reported or otherwise, that does not appear in either of the parties’ briefs, unless one of two conditions is met: the Board and opposing counsel have been notified in advance of the intention to cite to that case, or the citation is in response to a Board Member’s question or the opposing party’s oral argument. See Chapter 8.7(c)(vi) (Additional authorities).

(viii) Argument. — Parties are generally allotted 30 minutes per side to present their arguments. If a party anticipates needing more than 30 minutes, the party should submit a request for additional time, in writing, to the Oral Argument Coordinator at least 15 days prior to the date of oral argument. A copy of the request should be served on the opposing party as well.

If oral argument will be shared by two representatives, the allotted time may be apportioned between them according to their discretion. Representatives should not duplicate each other's arguments.

(ix) *Rebuttal.* — At the outset of oral argument or at the conclusion of his or her presentation, a party may reserve time for rebuttal, provided there is time remaining.

(x) *Questions from the bench.* — Board Members may ask questions at any time during oral argument. Parties should answer the Board's questions as directly as possible. Board Member questions apply toward the 30 minutes allotted for argument and do not extend that time.

(xi) *Marking of time.* — Parties are notified when their time for oral argument has elapsed. Parties are expected to monitor their own time, especially when reserving time for co-counsel or rebuttal. In the event of disagreement, the Board's timekeeping is controlling.

(xii) *Cessation of oral argument.* — At any point during oral argument, the Board may terminate oral argument if further argument appears unnecessary. The Board may terminate oral argument even if a party's allotted time has not expired.

(xiii) *Amicus curiae.* — Amicus curiae may present oral argument only upon advance permission of the Board. Such permission is granted sparingly. The time allotted to amicus curiae is determined on a case-by-case basis. Amicus curiae argue after both sides have concluded their arguments. Amicus curiae are subject to the same oral argument rules and limitations as the parties.

Where appropriate, the Board may provide parties an opportunity to respond to the oral argument of amicus curiae.

8.8 Conclusion of Oral Argument

(a) *Decision of the Board.* — Decisions are normally not rendered on the day of oral argument. Subsequent to oral argument, cases are processed in the standard manner. See Chapter 1.4(d) (Board decisions).

(b) *Supplemental briefs.* — The Board expects all issues to be fully briefed and argued by the conclusion of oral argument. Parties may not file supplemental briefs after oral argument, unless they are expressly solicited by the Board or warranted by emergent developments in the law or the case.

(c) *Transcripts.*— The Board always records oral argument, but a transcript is prepared only when a Board decision is under review by a federal court.